IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ANTRON MOROTO FAIRCHILD, Petitioner.	)	2 CA-CR 2006-0195-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20031133

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Rose Weston
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Antron Fairchild was convicted after a jury trial of two counts each of aggravated assault, aggravated robbery, and armed robbery and one count each of burglary and kidnapping. The trial court sentenced him to concurrent, partially mitigated prison terms, the longest of which was nine years. On appeal, Fairchild contended the trial court

had erred by refusing to give his proffered jury instruction on a victim's in-court identification of him and he was entitled to sentencing relief based on the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). We affirmed. *State v. Fairchild*, No. 2 CA-CR 2004-0178 (memorandum decision filed June 22, 2005). In this petition for review, Fairchild contends the trial court erred by denying his request for post-conviction relief based on the claim that appellate counsel was ineffective because she did not challenge the trial court's denial of her motion to suppress evidence. Absent an abuse of discretion, we will not disturb the trial court's ruling. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 To state a colorable claim of ineffective assistance of counsel, a defendant must establish counsel's performance fell below prevailing professional norms and counsel's deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 688, 104 S. Ct. 2052, 2064, 2065 (1984). Accordingly, to establish a claim of ineffective assistance of appellate counsel, a petitioner must establish there is a reasonable probability that, but for counsel's deficient performance, the outcome of the appeal would have been different. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). If a defendant cannot make a sufficient showing on either element of the *Strickland* test, he is not entitled to relief. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). In reviewing such claims, we, like trial courts, must be mindful that there is a strong

presumption counsel provided effective assistance. *State v. Valdez*, 167 Ariz. 328, 329-30, 806 P.2d 1376, 1377-78 (1991).

¶3 Fairchild contends appellate counsel was ineffective for failing to challenge Judge Kelly's denials of his motions to suppress certain identification evidence and items that officers had found in his pockets. And, he claims, Judge Dawley erred by denying Fairchild post-conviction relief on those grounds. Judge Dawley found Judge Kelly's ruling, entered after a suppression hearing, "was supported by the law and evidence. As such, the likelihood of a successful appeal, in which the appellant must show an abuse of discretion by the trial court, is minimal." Judge Dawley added, "[A]ppellate counsel's decision not to challenge the judge's ruling was both reasonable and professionally competent."

¶4 In his motion, Fairchild had argued police did not have sufficient justification to detain him as he and a companion were sitting at a bus stop underneath a bus shelter. Furthermore, he contended, police did not have probable cause to ask him to empty his pockets, which Fairchild contended was an unconstitutional search that revealed a broken silver necklace the victim had previously described to police. To determine whether Fairchild was entitled to post-conviction relief, we must examine whether there is a reasonable probability this court would have reversed Judge Kelly's ruling on appeal. In reviewing the denial of a motion to suppress evidence based on an alleged violation of the Fourth Amendment, we defer to the trial court with respect to any factual findings it made, but we review de novo mixed questions of law and fact and the trial court's ultimate legal

conclusion. *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996); *see also In re Maricopa County Juvenile Action No. JT30243*, 186 Ariz. 213, 216, 920 P.2d 779, 782 (App. 1996) ("[W]hether a person has been seized by police [for Fourth Amendment purposes] is a mixed question of fact and law.").

¶5 Police may stop a person for investigative purposes without violating the Fourth Amendment if they have reasonable, articulable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21, 30, 88 S. Ct. 1868, 1880, 1885 (1968); *see also State v. Wyman*, 197 Ariz. 10, ¶ 6, 3 P.3d 392, 395 (App. 2000). Officers may detain the person for law enforcement purposes so long as the stop and detention are minimally intrusive. *United States v. Sharpe*, 470 U.S. 675, 685, 105 S. Ct. 1568, 1575 (1985). Police may also approach and stop a pedestrian in order "to ask questions on any topic." *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997). Police may interact with a person without implicating the Fourth Amendment if the interaction is consensual. *Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388 (1991); *see also Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, [and] asking him if he is willing to answer some questions . . . ."). The test for determining if the contact is consensual is whether, in light of all the circumstances, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the

police presence and go about his business." *Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S. Ct. 1975, 1977 (1988).

¶6 Had appellate counsel challenged Judge Kelly's denial of Fairchild's motion to suppress on appeal, we would have considered only the evidence presented at the suppression hearing, and we would have viewed the evidence and the reasonable inferences therefrom in the light most favorable to upholding Judge Kelly's ruling. *See State v. Livingston*, 206 Ariz. 145, ¶ 3, 75 P.3d 1103, 1104 (App. 2003). We apply that same standard of review within the context of this post-conviction proceeding. Briefly, Tucson Police Officer Gregory Mammana testified he had been investigating a robbery and had detained a suspect, Harold High, within the area where the offense had been committed because he matched the description of the suspects: African American males wearing black, hooded sweatshirts. Mammana brought the victim to identify High but released High when the victim did not identify him as a perpetrator. Mammana then heard over the radio there had been another robbery, and High matched the description of the suspect. The victim of that robbery subsequently identified High, albeit somewhat equivocally. Mammana testified he had heard from Officer Sean Berube that Berube had approached two individuals in the area "quadded off," meaning an area near where the offenses had occurred and officers were essentially alerted to look for suspects.

¶7 Officer Berube testified he had responded to a call about one of two robberies and knew Mammana had stopped a suspect named Harold High.[1] Berube, like Mammana, testified Lopez did not recognize High as a perpetrator. Berube later saw Fairchild and his companion at a bus stop, stopped his patrol car, got out, and approached them. Berube testified neither man had tried to leave and Berube had not ordered either to stay there; he simply asked them some questions, including where they had been and whether they could verify where they had been. At that point, Berube learned one of the two persons was named Devon High, which Berube recognized as the same surname as the person Mammana had detained. He communicated this to Mammana. Berube detained the two for about ten minutes, while Mammana brought persons over to the bus stop for identification purposes. Berube stated neither had asked to leave during this period and had engaged in a "casual" conversation with them, discussing "what they were doing all night and how they ended up at that bus stop." Thereafter, Mammana brought an individual over, who identified the two as having been involved in a robbery and assault at an apartment complex. Berube testified that, once he learned both men had been identified, he asked Fairchild

> if he had anything illegal on him, and he said no, and he stood up and he showed me, he emptied his pockets, I don't have nothing illegal, and what he pulled out of his pocket was a broken silver necklace, which I remember being one of the stolen items.

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[1]On cross-examination, Berube testified he had actually been responding to a call about trespassing offenses. He also conceded he initially had reported the two as "suspects" but explained that had been "a bad choice of words."

Berube then arrested Fairchild.

¶8 After the suppression hearing, Judge Kelly denied the motion, finding

> the initial conversation between Officer Sean Berube and the defendant falls within the definition of a consensual encounter and . . . the defendant voluntarily emptied his pockets. The Court further finds that Officer Berube had probable cause to arrest the defendant after the show-up identification and that he was authorized to conduct a search of the defendant upon arrest.

There is reasonable evidence in the record supporting Judge Kelly's factual findings, and her legal conclusions are correct. And, to the extent conflicting evidence was presented at the suppression hearing, it was for Judge Kelly to resolve such conflicts. *See State v. Palmer*, 156 Ariz. 315, 316, 751 P.2d 975, 976 (App. 1987). Indeed, in ruling as she did, Judge Kelly commented that she had resolved the conflicting evidence about whether Fairchild voluntarily had emptied his pockets "in favor of the State." Officer Berube initially had a consensual encounter with Fairchild and Devon High. After learning Devon's last name, Berube properly detained the two for a reasonable period for law enforcement purposes: the identification. And, as the court noted at the end of the suppression hearing, even assuming Fairchild's pockets had been searched, for purposes of the Fourth Amendment, once Fairchild had been identified, there was probable cause to arrest him, and the evidence inevitably would have been discovered during a lawful search incident to his arrest. *See State v. Lamb*, 116 Ariz. 134, 138, 568 P.2d 1032, 1036 (1977).

¶9 Because Fairchild has failed to establish there is a reasonable probability that the outcome on appeal would have been different had appellate counsel challenged Judge Kelly's ruling, *see Herrera*, 183 Ariz. at 647, 905 P.2d at 1382, Judge Dawley did not abuse his discretion in denying Fairchild's request for post-conviction relief. We grant the petition for review therefore, but deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge